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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

R.H. RISON, *et al.*,

Petitioners,

v.

JOHN DEMJANJUK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE INTERNATIONAL ASSOCIATION OF JEWISH LAWYERS AND JURISTS (AMERICAN SECTION), AMERICAN JEWISH COMMITTEE, AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE, B'NAI B'RITH, NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS, THE SIMON WIESENTHAL CENTER, SOCIETY OF SURVIVORS OF THE RIGA GHETTO, INC., UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA, WORLD JEWISH CONGRESS, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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18 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 2

ARGUMENT 7

I. The Historic Decision of a Panel of the Sixth Circuit Should Receive Some Form of Appellate Review 7

II. The Sixth Circuit's Standard Unjustifiably Casts Doubt on the Office of Special Investigations 10

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Alexander v. Robertson,
882 F.2d 421 (9th Cir. 1988) 11

Aoude v. Mobil Oil Corp.,
892 F.2d 1115 (1st Cir. 1989) 11

Demjanjuk v. Petrovsky,
10 F.3d 338 (6th Cir. 1993) . . . . . *passim*

Fernandez v. Phillips,
268 U.S. 311 (1925) 9

Great Coastal Express, Inc. v. International Brotherhood of Teamsters,
675 F.2d 1349 (4th Cir. 1982) 11

In the Matter of John Demjanjuk,
603 F. Supp. 1463 (N.D. Ohio 1984) 9

Lockwood v. Bowles,
46 F.R.D. 625 (D.D.C. 1969) 11

Pfizer, Inc. v. International Rectifier Corp. (In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions),
538 F.2d 180 (8th Cir. 1976) 11

Sacher v. United States,
343 U.S. 1 (1952) 9

Wilson v. Johns-Manville Sales Corp.,
873 F.2d 869 (5th Cir. 1989) 11

STATUTES AND RULES

18 U.S.C. § 401 9

Fed. R. Civ. P. 60(b) . . . . . *passim*

Fed. R. Crim. P. 42(b) 9

Sup. Ct. R. 10.1 (a) 9

Sup. Ct. R. 37.2 7

OTHER AUTHORITIES

11 Charles A. Wright
& Arthur R. Miller,
Federal Practice and Procedure
§ 2870, at 255 (1973) 11

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INTEREST OF THE AMICI CURIAE

The International Association of Jewish Lawyers and Jurists (American Section) (hereinafter "IAJLJ") is a membership organization consisting of attorneys and judges in more than 32 countries around the world. Its founder was retired Justice Haim Cohn of the Supreme Court of Israel, and its Honorary President, until his death, was former Justice Arthur J. Goldberg. The American Section was organized in 1983 by members of the American Jewish legal community to defend Jewish interests and human rights in the United States and abroad.

Among the IAJLJ's concerns has been the identification and legal prosecution of those who participated in the genocide of the Jewish people during the Second World War. Our interest extends beyond the punishment of particular guilty individuals. We are also concerned with the verdict of history.

The public trial given to John Demjanjuk in Israel, followed by the meticulous scrutiny of the appellate record by the Supreme Court of Israel and that court's willingness to consider evidence that was not available at the time of the trial demonstrate the scrupulousness with which Demjanjuk was tried. The Supreme Court of Israel determined that the later-obtained documents created a doubt as to whether Demjanjuk was, in fact, "Ivan the Terrible" of Treblinka to warrant reversal of the judgment of conviction. His death sentence was vacated and Demjanjuk was released from custody in Israel. That is the nature of due process, and that court's judgment is the outcome of fair procedures. We are troubled, however, by the Sixth Circuit's *sua sponte* decision to reopen the extradition case in the United States. Its

rulings have skewed the process and produced an unjust result.

As lawyers and jurists we place an exceedingly high value on due process of law, and as Jews we are firmly committed to the Biblical doctrine: "Justice, justice shalt thou pursue." The recent decisions that have been rendered in this case by the Sixth Circuit do not, in our view, achieve justice.

We are filing this brief to support the request of the United States that a writ of certiorari be granted in this case. The reasons we have stated do not, we believe, duplicate the reasons supporting certiorari stated by the Solicitor General.

* * *

The American Jewish Committee believes deeply that those who aided or abetted Nazi war criminals must not receive sanctuary in the United States. We believe, too, that there is strong evidence that the respondent, John Demjanjuk, served the Nazi cause as a guard in a Nazi concentration camp and lied about his record when he sought refuge in the United States. Hence, we were dismayed at the decision *sua sponte* of the Sixth Circuit panel to reopen the extradition case against Demjanjuk on the ground of alleged prosecutorial misconduct. This ruling surely merits review. That is why we join in urging that the petition for certiorari be granted.

* * *

American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of Americans. In 1933, it was

the first Jewish organization to sound the alarm about the rise of Nazism, organizing a boycott of German-made goods. Since the end of World War II, American Jewish Congress has steadfastly sought the expulsion of Nazi criminals who have entered the country surreptitiously. Because the opinion below treats this wholly legitimate objective as if it were improper, tainting the prosecutorial processes, American Jewish Congress seeks leave to file this brief.

* * *

The Anti-Defamation League ("ADL") was organized in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. To advance these goals, ADL seeks goodwill and mutual understanding among Americans of all creeds and races and works to combat racial and religious prejudice and the deprivation of civil liberties.

From the beginnings of the unprecedented genocide committed by the Nazis against the Jewish people and other groups, the League has opposed Nazism in all its forms and activities. Following World War II, the League has sought to expose the perpetrators of those crimes against humanity and bring them to justice.

ADL has a keen interest in *Rison v. Demjanjuk* because the opinion below contains factual distortions regarding the Office of Special Investigations' relationship with ADL and with the American Jewish community and inaccurately implies that there was an inappropriate relationship between these groups.

* * *

B'nai B'rith is the world's largest Jewish social service organization with members in 51 countries. B'nai B'rith is committed to the pursuit of justice, protection of human rights, and the combatting of bigotry, hatred, and prejudice, wherever and in whatever form it may exist or be applied. B'nai B'rith is dedicated to promoting Jewish unity, preserving Jewish continuity, and protecting Jewish security. For these reasons, B'nai B'rith asks this Court to grant certiorari in this case.

* * *

The National Jewish Commission on Law and Public Affairs ("COLPA") is a national organization of volunteer lawyers and social scientists dedicated to combatting all forms of religious prejudice and discrimination and to representing the position of the nation's Orthodox Jewish community before courts, legislatures, and other governmental bodies. COLPA has filed numerous briefs *amicus curiae* in this Court and in the nation's courts of appeals in cases of importance to the Orthodox Jewish community.

COLPA joins in support of the petition for certiorari in this case because the actions of the court of appeals have unjustifiably cast a pall upon the exemplary program of the United States government seeking the expulsion of Nazi war criminals who improperly entered the United States. COLPA believes that the court of appeals' decision *sua sponte* to reopen the Demjanjuk extradition case and the conclusions it ultimately reached were plainly not supported by the record. COLPA therefore respectfully submits that the interests of justice would be served by the Court's review of this very troubling matter.

* * *

The Simon Wiesenthal Center, founded in 1977 and named for the famed Nazi hunter, is the largest private group in the United States devoted to teaching the lessons of the Holocaust. It has more than 400,000 member families and conducts research and provides education about the genocide committed against the Jewish people by the Nazis in World War II. In the past, the Center and its staff has assisted the governments of Argentina, Canada, France, Israel, Italy, Germany, Russia, the United Kingdom, and the United States in the investigation and prosecution of individuals accused of being war criminals.

* * *

Society of Survivors of the Riga Ghetto, Inc. is an organization of survivors of World War II's Nazi genocide. The Society of Survivors is dedicated to ensuring justice for the victims of heinous human rights violations committed during the Holocaust. It is of utmost concern to the Society of Survivors that Nazi war criminals such as John Demjanjuk are not permitted to remain in this country.

* * *

The Union of Orthodox Jewish Congregations of America is a membership organization of close to one thousand Orthodox Jewish synagogies in the United States that advocates the interests and concerns of Orthodox Jews in public fora.

We declare our interest in joining the International Association of Jewish Lawyers and Jurists' *amicus* brief because we find the August 3, 1993 decision of the Sixth

Circuit Court of Appeals ordering the Federal government to allow John Demjanjuk to return to the United States a cause for deep dismay. According to existing United States immigration law, there is no reason or valid basis to return John Demjanjuk to the United States.

* * *

In 1942, the World Jewish Congress was the agency that first revealed, to an unbelieving world, the Nazi plan for the "final solution" of the Jewish people. Today the Congress is the representative body of Jewish communities in more than eighty countries and works to pursue the struggle for human rights everywhere and for the rights and status of Jews wherever they may be threatened. This case presents such a struggle, and the Congress hereby declares its interest that justice be served.

Pursuant to Supreme Court Rule 37.2, *amici curiae* have obtained the consent of all parties in this action to the filing of this brief in support of petitioners. Letters of consent are on file with the Clerk of this Court.

ARGUMENT

I

THE HISTORIC DECISION OF A PANEL OF THE SIXTH CIRCUIT SHOULD RECEIVE SOME FORM OF APPELLATE REVIEW

On June 5, 1992, the Sixth Circuit panel issued an order *sua sponte* based on information that "had come to the attention" of the Court suggesting that its affirmance in 1985

of the denial of habeas corpus challenging the extradition of respondent was "improvident." The panel ordered counsel to appear for a hearing on a number of questions that it propounded.

The panel thereafter appointed a Special Master, District Judge Thomas Wiseman, who held hearings, took evidence, and made extensive findings. In the decision now under review, the panel rejected the conclusions of the Special Master (although it declined to overturn the Special Master's factual findings that the Department of Justice's Office of Special Investigations ("OSI") attorneys had acted in good faith) and held that "prosecutorial misconduct that constituted fraud on the court" invalidated the extradition proceeding. The full Sixth Circuit thereafter denied the United States' suggestion for rehearing *en banc*.

The historic decision of the panel deserves appellate review. It has received none. This proceeding was initiated by a panel of three Circuit Judges who believed from the outset, from information apparently obtained through the media, that they were "misled" by "prosecutorial misconduct."

Whether there is basis in fact and law for the belief that led the panel to initiate this phase of the proceeding and to set aside its own prior decision should not remain wholly unreviewed. This is especially true since the panel significantly lowered the standard required to satisfy the extraordinary "fraud on the court" remedy provided by Federal Rule of Civil Procedure 60(b), in conflict with every other Circuit Court to have considered the question. That legal issue presented by the Solicitor General's petition deserves review. By its decision to reopen the extradition case and demand explanations from the Department of

Justice, the panel went far beyond the power that American courts have in international extradition cases, where the accepted standard is only whether there is probable cause to believe that the accused has committed an extraditable offense. *E.g.*, *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *In the Matter of John Demjanjuk*, 603 F. Supp. 1463, 1464 (N.D. Ohio 1984). Clearly, the Sixth Circuit panel "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10.1 (a).

A parallel that comes to mind is a contempt proceeding for violation of a court order outside the presence of the court. A judge is permitted to initiate a contempt proceeding and to preside over the determination as to whether contempt was committed. 18 U.S.C. § 401; Rule 42(b), Fed. R. Crim. P. But it would be extraordinary to give the last word on this issue to the judge who finds that his own order has been violated. The mere possibility of such an unreviewable judgment would be an invitation to injustice. Indeed, this Court in *Sacher v. United States*, 343 U.S. 1 (1952), held that the contempt power can be summarily exercised by a trial judge *only* because there will be some kind of review. "The profession knows that no lawyer is at the mercy of a single federal trial judge. This case demonstrates that before punishment takes effect he may have appeal on law and fact to the Court of Appeals." 343 U.S. at 12-13.

This case deserves the "supervisory authority" of this Court. The Sixth Circuit panel deliberately turned itself into a court of first instance with regard to the issues raised by its *sua sponte* order of June 5, 1992. It did *not* remand the case to the district court that had originally heard the extradition proceeding for it to render a trial-court judgment on the

issues presented, subject to appellate review by a randomly selected panel of the Sixth Circuit. Instead, the panel retained jurisdiction and chose a Special Master. It assigned to the Special Master tasks that are ordinarily assigned *by district courts* to Special Masters. Consequently, the Sixth Circuit decision should be treated as the decision of a court of first instance.

This is a lawsuit that has international repercussions and serious implications for history. If this Court were to leave the panel's decision unreviewed, the American public, the international community, and the survivors of the Holocaust -- as well as the Department of Justice attorneys who have been branded as perpetrators of "prosecutorial misconduct" -- would effectively be deprived of any appellate review whatsoever of the panel's determination. And, what concerns these *amici* particularly, the judgment of history concerning the proceedings brought against John Demjanjuk in the United States would be left with a wholly unjustified stain.

The judgment that is recorded for all time in the pages of history should be the judgment of the highest court in the land and not the unreviewed conclusion of a panel of three Circuit Judges who themselves initiated the proceeding and then retained jurisdiction over it.

II

THE SIXTH CIRCUIT'S STANDARD UNJUSTIFIABLY CASTS DOUBT ON THE OFFICE OF SPECIAL INVESTIGATIONS

The panel of the Sixth Circuit stated its understanding of "fraud on the court" as follows: "Although there are

cases holding that a 'plan or scheme' must exist in order to find fraud on the court, we agree with Judge Wiseman that a scheme, based on a subjective intent to commit fraud, is not required in a case *such as this*. Reckless disregard for the truth is sufficient." 10 F.3d at 352-53 (emphasis added).

The court invoked the saving clause of Federal Rule of Civil Procedure 60(b) -- "This rule does not limit the power of a court . . . to set aside a judgment for fraud upon the court." But it failed to realize that this is an *extraordinary* remedy. There is no time limitation on the court's power to invalidate civil judgments because of "fraud on the court." The extraordinariness of the remedy requires extraordinary conduct.

Most courts of appeals have limited the "fraud on the court" remedy to "the most egregious conduct involving a corruption of the judicial process itself." 11 Wright & Miller, Federal Practice and Procedure § 2870, at 255 (1973) (quoting *Lockwood v. Bowles*, 46 F.R.D. 625, 632 (D.D.C. 1969)). Indeed, the First, Fourth, Fifth, Eighth, and Ninth Circuits have concluded that the power to set aside a judgment for "fraud on the court" cannot be exercised without proof of a "plan" or "scheme" to defraud. [1] Such formulation "unmistakably requires intentional misconduct." Pet. for Cert. 16.

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[1] *See, e.g. Aoude v. Mobil Oil Corporation*, 892 F.2d 1115, 1118 (1st Cir. 1989); *Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1356 (4th Cir. 1982); *Wilson v. Johns-Manville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989); *Pfizer, Inc. v. International Rectifier Corp.* (In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions), 538 F.2d 180, 195 (8th Cir. 1976); *Alexander v. Robertson*, 882 F.2d 421, 425 (9th Cir. 1988).

The Sixth Circuit found that it need not follow the subjective intent standard in a case "such as this." Nothing, in our view, warrants relaxing the legal standard for reopening a judgment entered in a denaturalization, deportation or extradition hearing. Indeed, the difficulties ordinarily encountered by the Department of Justice's Office of Special Investigations warrant a more severe standard of proof than the loose standard formulated in this case.

The important work of OSI is to insure that the United States not serve as a safe haven for those who participated in the massive crime against humanity known as the Holocaust. From historical documents and interviews with Holocaust survivors, OSI attorneys investigate and, when appropriate, take legal action against individuals who were admitted as aliens into, or became naturalized citizens of, the United States and who had assisted the Nazis in their genocide of racial and ethnic and religious communities.

The Sixth Circuit panel expressly declined to overturn the Special Master's finding that OSI attorneys "'did not intend to violate the Rules or their ethical obligations . . . they did not misstate facts or the law as they understood them, and did not make statements in ignorance while aware of their ignorance. Although they were blinded to what we may now perceive to be the truth, they were not wilfully blind.'" 10 F.3d at 349.

The Sixth Circuit's holding that the OSI attorneys have perpetrated a "fraud on the court" despite their "good faith" conduct will unjustifiably chill the activity of that office. The work of OSI entails sifting through archival materials in this country and abroad, and depends on the accuracy of witness identifications. Under exceedingly difficult conditions, OSI attorneys, acting in good faith, have

succeeded admirably in applying rules of American law to the unusual situation of foreign war criminals who covertly sought refuge in this country. They do not deserve the cloud on their integrity that the panel of the Sixth Circuit has created. [2]

Should the Sixth Circuit's standard be permitted to stand, it will encourage collateral attacks on other concluded proceedings against Nazi war criminals. Dubious new testimony is now available from Eastern European countries that previously had been closed societies. Zealous and energetic friends and attorneys of those who have been accused and judged can turn up documents of questionable relevance or authenticity to try to impugn final judgments that are otherwise supported by strong evidence. In the Sixth Circuit, they need now show only an omission here or a misstatement there to justify the finding of a "fraud on the court." With such challenges may come increased false assertions that the Holocaust never happened or that the prosecution of war criminals was motivated only by political considerations. The American judicial system should not lend its authority and its dignity to these historical falsehoods.

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[2] The Sixth Circuit panel also implied gratuitously that OSI had been improperly influenced by Jewish organizations, including *amicus* Anti-Defamation League, notwithstanding the Special Master's finding to the contrary. 10 F.3d at 354-55. This aspersion on the integrity of both OSI and Jewish organizations is wholly unwarranted.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari in this case and review the judgment of the Sixth Circuit.

Respectfully submitted,

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